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Nos. 03-1293 and 03-1294

In the Supreme Court of the United States

DAVID WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

HAYWOOD EUDON HALL, AKA DON HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), requires proof of an overt act in furtherance of the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 349 F.3d 1320.

JURISDICTION

The judgments of the court of appeals were entered on November 10, 2003. On January 14, 2004, Justice Kennedy extended petitioner Whitfield's time within which to file a petition for a writ of certiorari to and including March 8, 2004, and the petition was filed on March 5, 2004. On February 5, 2004, Justice Kennedy

[1] "Pet. App." refers to the appendix to the petition in No. 03-1294.

extended petitioner Hall's time within which to file a petition for a writ of certiorari to and including March 10, 2003, and the petition was filed on that date. The petitions for writs of certiorari were granted on June 21, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1956(h) of Title 18 of the United States Code provides as follows:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

2. Section 1956(i) of Title 18 of the United States Code (Supp. I 2001) provides, in part, as follows:

> Venue.—(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—
>
> (A) any district in which the financial or monetary transaction is conducted; or
>
> (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.
>
> (2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners Whitfield and Hall were convicted of conspiracy to commit mail fraud, wire fraud, and interstate transportation of property taken by fraud, in violation of 18 U.S.C. 371, and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Whitfield was also convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and five counts of unlawful monetary transactions, in violation of 18 U.S.C. 1957. Hall was also convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341. Whitfield was sentenced to 235 months of imprisonment, and Hall was sentenced to 185 months of imprisonment, each to be followed by three years of supervised release. Whitfield Pet. App. 9a-10a; Pet. App. 15a-17a. Petitioners were also ordered to pay $85,030,412 in restitution. J.A. 33. The court of appeals affirmed the convictions, rejecting the contention that proof of an overt act is an element of money laundering conspiracy.[2] Pet. App. 1a-11a.

1. On March 10, 1999, a federal grand jury in the Middle District of Florida returned a 20-count indictment against petitioners and five others. As relevant here, petitioners were charged in count one of the indictment with conspiracy to commit mail fraud, wire

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[2] The court of appeals remanded Hall's case for resentencing because the district court had erroneously enhanced his sentence under the Sentencing Guidelines. The district court subsequently sentenced Hall to 137 months of imprisonment.

fraud, and interstate transportation of goods and money taken by fraud, in violation of 18 U.S.C. 371. That count described the scheme in the "manner and means" section and alleged, as part of the scheme, that petitioners conducted financial transactions involving the proceeds of their mail fraud scheme. J.A. 6. Count one also listed 20 overt acts. Many of the overt acts pertained to petitioners' money laundering activities. J.A. 6-9. Count two of the indictment charged petitioners with conspiracy to launder money, in violation of 18 U.S.C. 1956(h), and incorporated the "manner and means" section of count one. Count two did not allege that the conspirators had committed any overt act in furtherance of the money laundering conspiracy. J.A. 1-10.

2. The evidence at petitioners' trial showed that petitioners were members of the executive board of the Greater Ministries International Church (GMIC). GMIC ran a "gifting" program that took in more than $400 million between 1996 and 1999. Under that program, investors would "gift" money to GMIC; in exchange, the investors were promised a return that doubled their contribution. Petitioners touted the program in presentations throughout the country. They explained that profits were generated through investments in gold and diamond mining, offshore commodities, and overseas banks that paid high interest rates, and that profits also were used for philanthropic purposes. Pet. App. 3a; Gov't C.A. Br. 6-9, 15.

Most of those claims were false. GMIC had no assets, and many investors received little or no return on their gifts. Virtually none of the money was donated to charity. Instead, petitioners and their co-conspirators received commissions on money that they solicited. Petitioner Hall received more than $539,000, and petitioner Whitfield received more than $678,000, all in cash. During the course of the scheme, the conspirators deposited personal checks from investors made payable to GMIC and exchanged them for cash. Pet. App. 4a-5a; Gov't C.A. Br. 13-15.

3. At the close of the evidence, petitioners asked the district court to instruct the jury that the government was required to prove beyond a reasonable doubt that an overt act in furtherance of the money laundering conspiracy had been committed. The district court declined to give that instruction.[3] J.A. 19-21.

4. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-11a. It held that the district court had correctly instructed the jury on the elements of 18 U.S.C. 1956(h), because the statute does not require proof of an overt act. The court of appeals faulted decisions finding otherwise because those decisions relied on case law interpreting the general conspiracy statute, 18 U.S.C. 371, which "expressly requires proof of an overt act." Pet. App. 6a. It reasoned that Section 1956(h) "is not like § 371, but instead is nearly identical" to the drug conspiracy statute, 21 U.S.C. 846, whose language "does not call for an overt act." Pet. App. 6a. Observing that this Court "refused to infer an overt act

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[3] The district court's instruction to the jury on the elements of 18 U.S.C. 1956(h) was as follows:

> In order for you to find any defendant guilty of this crime, you must be convinced that the Government has proven each of the following elements beyond a reasonable doubt: First, that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and second, that the defendant under consideration knowingly and willfully became a member of such conspiracy.

J.A. 22-23.

requirement into the [drug conspiracy] statute" in *United States* v. *Shabani*, 513 U.S. 10, 13 (1994), Pet. App. 6a, the court of appeals concluded that *Shabani* "compelled" the conclusion that Section 1956(h) does not require proof of an overt act, *id.* at 7a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that proof of an overt act is not required in order to establish the crime of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Section 1956(h) provides that "[a]ny person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. 1956(h). The text of Section 1956(h) does not identify an overt act, or conduct in furtherance of the conspiracy, as an element of the offense. Nor can an overt act requirement be implied. It is well settled that an overt act was not an element of conspiracy at common law. When Congress employs a common law term, it is presumed, absent contrary evidence, to adopt the common law meaning of that term. There is no evidence that Congress intended the term "conspires" to carry anything other than its common law meaning. Congress has enacted numerous conspiracy statutes, including 18 U.S.C. 371, that expressly contain an overt act requirement, while enacting others, such as the Sherman Act, 15 U.S.C. 1, that do not. Congress's practice confirms that it uses the term "conspires" in its common law sense, *i.e.*, with no overt act requirement; otherwise, the explicit overt act requirements in the other conspiracy statutes would be superfluous.

A line of this Court's cases interpreting the elements of conspiracy statutes over the last century dictates the conclusion that proof of an overt act is not required

under Section 1956(h). In *United States* v. *Shabani*, 513 U.S. 10 (1994), this Court held that the drug conspiracy statute—which, like Section 1956(h), contains no explicit overt act requirement—does not require proof of an overt act. Citing *Nash* v. *United States*, 229 U.S. 373 (1913) (Holmes, J.), and *Singer* v. *United States*, 323 U.S. 338 (1945), the Court explained that its prior cases interpreting conspiracy statutes "give Congress a formulary: by choosing a text modeled on § 371, it gets an overt act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." 513 U.S. at 14 (internal quotation marks omitted). By choosing a text modeled on the Sherman Act and the drug conspiracy statute, Congress dispensed with the overt act requirement for money laundering conspiracies.

Petitioners seek to avoid application of the textual formulary explained in *Shabani* by resorting to Section 1956(h)'s legislative history. Their reliance on that legislative history is unavailing, however, because even if this Court ventures beyond the unambiguous text—which it should not—that history does not support their position. That history demonstrates that Congress modeled Section 1956(h) on the drug conspiracy statute construed in *Shabani*. Nor are petitioners helped by the observation that Congress enacted Section 1956(h) for the purpose of increasing the penalties for money laundering conspiracies that previously were prosecuted under Section 371. Congress's intent to punish money laundering conspiracies more severely than before—which it accomplished without regard to whether Section 1956(h) includes an overt act requirement—does not undercut the necessary inference that Congress's omission of an overt act requirement from the text of the new statute was purposeful. Indeed,

Shabani rejected the argument that a conspiracy statute should be read to include an overt act requirement unless Congress explicitly states its intention to omit it.

Petitioners' reliance on 18 U.S.C. 1956(i) (Supp. I 2001), a venue provision for money laundering cases enacted as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 1004, 115 Stat. 392 (USA PATRIOT Act), is also misplaced. Among other things, Section 1956(i) codified the longstanding rule that venue for conspiracies may lie in any district where an overt act was committed. But Section 1956(i) does not *require* proof of an overt act to establish venue in every case. And, more importantly, Section 1956(i) is consistent with the widely applied rule that venue in a conspiracy case lies wherever an overt act was committed, even where the underlying conspiracy statute does *not* require proof of an overt act to establish the offense. Section 1956(i)'s bases for establishing venue therefore say nothing about the elements of the money laundering conspiracy offense.

Petitioners additionally press the policy argument that an overt act requirement would serve as an important check on prosecutors. Given that Congress plainly omitted an overt act requirement from Section 1956(h), such policy arguments must be addressed to Congress. Petitioners' invocation of the rule of lenity is equally misplaced, because it applies only to ambiguous statutes.

ARGUMENT

THE MONEY LAUNDERING CONSPIRACY STATUTE, 18 U.S.C. 1956(h), DOES NOT REQUIRE PROOF OF AN OVERT ACT

The court of appeals correctly held that the money laundering conspiracy statute, 18 U.S.C. 1956(h), does not require proof of an overt act in furtherance of the conspiracy. The text of the statute does not define the offense to include an overt act or its equivalent, and this Court has made clear that a criminal conspiracy statute whose text does not contain an overt act requirement should not be read to require proof of an overt act.

A. The Text of 18 U.S.C. 1956(h) Makes Clear That Proof Of An Overt Act Is Not Required

There is no textual support for the contention of petitioners (Br. 10-33) and amicus National Association of Criminal Defense Lawyers (NACDL) (Br. 7-9) that the money laundering conspiracy statute, 18 U.S.C. 1956(h), requires proof of an overt act. Section 1956(h) provides: "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

The text of the statute does not contain an overt act requirement.[4] Rather, it subjects to criminal liability

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[4] Congress has used different language when providing for an overt act requirement in conspiracy statutes. It either uses the term "overt act" or language that describes an overt act, *i.e.*, conduct or an act in furtherance of the conspiracy. Compare, *e.g.*, 18 U.S.C. 1029(b)(2) ("Whoever is a party to a conspiracy of two or more persons to commit an offense under subsection (a) of this section, if any of the parties *engages in any conduct in furtherance of such offense*, shall be fined.") (emphasis added), with 18 U.S.C.

anyone "who conspires to commit" a money laundering crime set out in Section 1956 or Section 1957. Petitioners must therefore locate an overt act in the word "conspires," but they cannot do so in light of the common law and this Court's cases.

First, at common law, proof of an overt act was not required to establish a conspiracy. As this Court explained in *Shabani*, "the common law understanding of conspiracy 'does not make the doing of any act other than the act of conspiring a condition of liability.'" 513 U.S. at 13-14 (quoting *Nash*, 229 U.S. at 378); see *Bannon* v. *United States*, 156 U.S. 464, 468 (1895) ("At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy.").

Second, under the "settled principle of statutory construction," *Shabani*, 513 U.S. at 13, it must be presumed, in the absence of contrary evidence, that Congress intended to adopt the common law understanding of conspiracy when it used the term "conspires" in Section 1956(h). *Ibid.*; see *Neder* v. *United States*, 527 U.S. 1, 21-22 (1999); *United States* v. *Turley*, 352 U.S. 407, 411 (1957) ("[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."). That presumption is corroborated by the fact that Congress has expressly included an overt act requirement in many other conspiracy statutes.

1201(c) ("If two or more persons conspire to violate this section and one or more of such persons *do any overt act to effect the object of the conspiracy*, each shall be punished.") (emphasis added). Congress did not include either of those formulations in Section 1956(h).

For example, the general conspiracy statute provides in pertinent part:

> If two or more persons conspire * * * to commit any offense against the United States, * * * and *one or more of such persons do any act to effect the object of the conspiracy*, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. 371 (emphasis added).[5] At least 22 other current criminal conspiracy statutes likewise expressly require proof of an overt act.[6] The inclusion of an

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[5] Congress first enacted a general conspiracy statute in 1867. Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 484; see *Hyde* v. *United States*, 225 U.S. 347, 361 (1912); *Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, 946 n.176 (1959). The general conspiracy statute was later codified as Section 5440 of the Revised Statutes (1873-1874) and then as Section 37 of the Criminal Code of 1909. Act of Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096. After further recodification, see 18 U.S.C. 88 (1925); 18 U.S.C. 371 (Supp. II 1948), it emerged in its current version as 18 U.S.C. 371.

[6] See 18 U.S.C. 351(d) (conspiracy to kill or kidnap certain government officials), 793(g) (conspiracy to violate laws on national defense information), 831(a)(8) (conspiracy to engage in prohibited transactions involving nuclear materials), 956(a) (conspiracy to injure property of foreign government), 1029(b)(2) (conspiracy to commit credit card fraud), 1117 (conspiracy to murder certain government and foreign officials), 1201(c) (conspiracy to kidnap), 1365(e) (conspiracy to tamper with consumer products), 1511(a)(1) (conspiracy to obstruct enforcement of criminal laws to facilitate illegal gambling), 1751(d) (conspiracy to kill or kidnap President and other Executive Branch officials), 1831(a)(5) (conspiracy to commit economic espionage), 1832(a)(5) (conspiracy to steal trade secrets), 2118(d) (conspiracy to commit certain drug robberies), 2153(b) (conspiracy to obstruct national defense activities), 2154(b) (conspiracy to produce defective war materials), 2155(b) (conspiracy to destroy national defense materials), 2156(b) (conspiracy to produce defective national defense material), 2332(b) (conspiracy

express overt act requirement in so many statutes indicates that when Congress intends to require proof of an overt act, it expressly includes such a requirement in the text of the statute. It thus follows that when Congress uses the unadorned term "conspire" in a criminal statute, as it did in Section 1956(h), it intends for that word to carry its common law meaning. Otherwise, the express overt act requirement in numerous conspiracy statutes would be superfluous.

This Court has consistently held that Congress has perpetuated the common law definition of conspiracy in its criminal statutes. See *Salinas* v. *United States*, 522 U.S. 52, 63 (1997) (refusing to read an overt act requirement into 18 U.S.C. 1962(d), which makes it unlawful to "conspire" to commit RICO offense); *Shabani*, 513 U.S. at 13-14 (same with respect to 21 U.S.C. 846, which makes it unlawful to "conspire[] to commit" specified drug offenses); *Singer*, 323 U.S. at 340 (same with respect to Selective Training and Service Act of 1940, ch. 720, § 11, 54 Stat. 894, which prohibited, *inter alia*, "conspir[ing] to" evade registration or service in the land or naval forces); *Nash*, 229 U.S. at 378 (same with respect to Sherman Act because that law "punishes the conspiracies at which it is aimed on the common-law footing,—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability"). Congress's omission of an overt act

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to kill United States national outside the United States), 2388(b) (conspiracy to convey false information in order to interfere with war effort or cause insubordination in military); 42 U.S.C. 1761(o)(3) (conspiracy to defraud United States in connection with summer food service program for children in service institutions); 47 U.S.C. 509(a)(5) (conspiracy to commit fraud in connection with radio and television game shows); 49 U.S.C. 46505(e) (Supp. I 2001) (conspiracy to carry a weapon or explosive on an aircraft).

requirement in Section 1956(h)—which, like the conspiracy statutes at issue in *Salinas*, *Shabani*, *Singer*, and *Nash*, identifies the act of conspiring as the only condition of liability—thus provides compelling evidence that it intended to punish money laundering conspiracies "on the common-law footing," *Nash*, 229 U.S. at 378. See Wayne R. LaFave, *Substantive Criminal Law* § 12.2, at 626 (4th ed. 2003) ("On the federal level, an overt act is specifically required by the general conspiracy statute, and thus the absence of such a requirement in subsequently enacted federal conspiracy statutes dealing with specific subjects ha[s] been taken to reflect an intent by Congress to instead follow the common law as to those other provisions.") (footnotes omitted).

B. This Court's Decisions Dictate That, Because 18 U.S.C. 1956(h) Does Not Contain An Express Overt Act Requirement, It Does Not Require Proof Of An Overt Act

The court of appeals was correct in observing that this Court's decision in *Shabani* "compel[s]" the conclusion that Section 1956(h) does not require proof of an overt act. Pet. App. 7a. In *Shabani*, the Court unanimously rejected the argument that courts should read an overt act requirement into the drug conspiracy statute, 21 U.S.C. 846. Section 846 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The Court observed that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt act requirement. The Court found that textual contrast between the two statutes to be dispositive, because the Court's prior

decisions in *Singer* and *Nash* "give Congress a formulary: by choosing a text modeled on [18 U.S.C.] 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." 513 U.S. at 14 (internal quotation marks omitted). Because Congress chose to follow the latter model in Section 846, the *Shabani* Court held that "the Government need not prove the commission of any overt acts in furtherance of the conspiracy." *Id.* at 15.[7]

Section 1956(h), like the virtually identically worded drug conspiracy statute, does not mention an overt act requirement. *Shabani*, *Singer*, and *Nash*, and the "formulary" they establish, thus dictate the result in this case.[8]

[7] By the same token, when construing conspiracy statutes that expressly require proof of an overt act, this Court has explained that such express language overcomes the presumption that Congress intends to carry forward the common law rule that proof of an overt act is not required to establish a conspiracy. The Court has said that the first clause of the general conspiracy statute —which, like Section 1956(h), covers a person who "conspire[s] * * * to commit [an] offense"—requires proof of "nothing more than an agreement to engage in the prohibited conduct," *United States* v. *Feola*, 420 U.S. 671, 687 (1975). The Court has construed the second clause of the general conspiracy statute—which requires proof that "one or more of such persons do any act to effect the object of the conspiracy" and which is not found in Section 1956(h)—as importing an overt act requirement into the statute. *Fiswick* v. *United States*, 329 U.S. 211, 216 n.4 (1946). Moreover, the Court has explained that the express inclusion of an overt act requirement in the text is a necessary predicate for requiring proof of an overt act because "[a]t common law it was not necessary to aver or prove an overt act" to establish a conspiracy. *Ibid.*; accord *Hyde* v. *United States*, 225 U.S. 347, 359 (1912); see, *e.g.*, *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915); *Hyde* v. *Shine*, 199 U.S. 62, 76 (1905).

C. Section 1956(h) Is Not Meaningfully Distinguishable From The Drug Conspiracy Statute

Petitioners' attempt to avoid one hundred years of this Court's precedent interpreting conspiracy statutes similar to Section 1956(h) fails. Neither they nor their amicus offers a sound basis for departing from the bright-line rule this Court applied in *Shabani* and its long line of predecessors.

1. Petitioners first rely (Br. 17-18) on the fact that money laundering conspiracies charged under 18 U.S.C. 371 required proof of an overt act, while drug conspiracies charged under the statutory predecessors to 21 U.S.C. 846 did not. Their reliance is misplaced. *Shabani* did not mention, much less rely on, the fact that the drug conspiracy laws that Section 846 replaced had been construed by some courts not to require an

[8] The Fourth and Ninth Circuits, like the court below, have applied *Shabani* to hold that Section 1956(h) does not require proof of an overt act. See *United States* v. *Bolden*, 325 F.3d 471, 491 (4th Cir. 2003); *United States* v. *Tam*, 240 F.3d 797, 802 (9th Cir. 2001). See also *United States* v. *LaSpina*, 299 F.3d 165, 173 n.2 (2d Cir. 2002) (noting, but not resolving, potential application of *Shabani* to Section 1956(h)); *United States* v. *Threadgill*, 172 F.3d 357, 366 & n.5 (5th Cir. 2001) (same). In contrast, those circuits that have required proof of an overt act have not addressed the effect of *Shabani* on the question whether Section 1956(h) requires proof of an overt act and, replicating the mistake the Ninth Circuit had made under the drug statute, see *Shabani*, 513 U.S. at 15, relied on opinions interpreting 18 U.S.C. 371 or 21 U.S.C. 846 that did not survive *Shabani*. See *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001), cert. denied, 535 U.S. 1029 (2002); *United States* v. *Ross*, 190 F.3d 446, 450 (6th Cir.), cert. denied, 528 U.S. 1033 (1999); *United States* v. *Navarro*, 145 F.3d 580, 593 (3d Cir. 1998); *United States* v. *Emerson*, 128 F.3d 557, 561 (7th Cir. 1997).

overt act requirement. *Shabani* instead relied on the text of the drug conspiracy statute; it "found instructive," 513 U.S. at 14, the contrast between Section 371's express requirement of an overt act and the drug conspiracy statute's omission of it; and it criticized the Ninth Circuit for relying on the Court's precedents interpreting Section 371 and "ignor[ing] the textual variations between the two provisions," *id.* at 15. Indeed, the fact that "the general conspiracy statute preceded and presumably provided the framework for the more specific drug conspiracy statute," *id.* at 14, the Court reasoned, counseled *against* reading an overt act element into the different language of 21 U.S.C. 846. 513 U.S. at 14; see *Singer*, 323 U.S. at 340-343 (holding that conspiracy provision in Selective Training and Service Act did not require proof of an overt act, notwithstanding that conspiracies to commit non-violent offenses outlawed by the Act were previously brought under Section 37 (35 Stat. 1096) (now 18 U.S.C. 371), which contained an overt act requirement).[9]

[9] Drug conspiracies also were originally prosecuted under 18 U.S.C. 371. See, *e.g.*, *On Lee* v. *United States*, 343 U.S. 747 (1952); *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943). In 1951, Congress created a drug conspiracy offense outside of Section 371 so that it could be prosecuted separately and punished more severely. See Act of Nov. 2, 1951, ch. 666, § 1, 65 Stat. 767 (codified at 21 U.S.C. 174 (Supp. V 1951)); *United States* v. *Gardner*, 202 F. Supp. 256, 258-259 (N.D. Cal. 1962) (observing that Congress, when it enacted Section 846's precursor, "was concerned primarily with increasing and making more uniform penalties for narcotics violations" and that "[a] construction in favor of a separate offense [from Section 371] also would seem to be more consistent" with that intent). A similar provision proscribing conspiracies to import and traffic in marijuana was enacted in 1956. Act of July 18, 1956, ch. 629, Tit. I, § 106, 70 Stat. 570 (codified at 21 U.S.C. 176a (Supp. IV 1957)). Those provisions did not mention an overt act requirement, and courts interpreting them concluded for that reason that they did not contain one. See *Gardner*, 202 F. Supp. at 258-259; see also *Leyvas* v. *United States*, 371 F.2d 714, 717 & n.4 (9th Cir. 1967) (adopting the reasoning of *Gardner*); *United States* v. *Garfoli*, 324 F.2d 909, 910-911 (7th Cir. 1963). Congress did not appear to have a quarrel with those decisions when it enacted Section 846, which, like its immediate precursors, omits any mention of an overt act requirement.

2. Petitioners (Br. 12-15, 18) and NACDL (Br. 7-8 & n.4) also contend that *Shabani* is not controlling because the legislative history of Section 1956(h) differs from that of the drug conspiracy statute. There is no reason to go beyond the text of Section 1956(h) and the textual similarities between that section and the statute at issue in *Shabani*. See *Lamie* v. *United States Tr.*, 124 S. Ct. 1023, 1031 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress" and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history."). But even if this Court were to consider legislative history in the face of an unambiguous statute, there is nothing in the legislative history of Section 1956(h) to support petitioners' contention that Congress meant to contravene the clear wording of the statute omitting an overt act requirement. See *Salinas*, 522 U.S. at 57 ("[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from th[e] [statutory] language.") (internal quotation marks omitted). To the contrary, the legislative history confirms that Congress modeled Section 1956(h) on the drug conspiracy statute at issue in *Shabani*.

Section 1956(h) was passed as part of the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, § 1501, 106 Stat. 4044 (1992), which included vari-

ous money laundering enforcement improvements.[10] Similar bills had been proposed in 1990, 1991 and 1992,[11] and they included a provision for money laundering conspiracies (subsequently enacted and codified at Section 1956(h) without material change) whose structure and language, by design, mirrored that of 21 U.S.C. 846. See, *e.g.*, 137 Cong. Rec. 21,997, 22,001 (1991) (section analysis of Money Laundering Improvements Act of 1991 (S. 1665) provides that Section 209, the money laundering conspiracy provision, "is modeled on the penalty provision for drug conspiracies in 21 U.S.C. § 846"). Indeed, the language of Section 1956(h) is virtually identical to the language of 21 U.S.C. 846. By choosing, as its prototype, a text without an overt act requirement and by failing to add the overt act language from 18 U.S.C. 371, Congress evidenced its intent to omit that requirement. See *Shabani*, 513 U.S. at 13 ("[W]e have not inferred [an overt act] requirement from congressional silence in other statutes").

Petitioners rely not on any "extraordinary showing" of Congress's contrary intent, but rather on silence in the legislative history concerning any intent to dispense with the overt act requirement that existed when money laundering conspiracies were prosecuted under Section 371. But congressional silence on this score is

[10] The money laundering conspiracy provision was originally codified at 18 U.S.C. 1956(g), but Congress re-designated the provision at 18 U.S.C. 1956(h) as part of the Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, Tit. IV, § 401, 108 Stat. 2243.

[11] *E.g.*, the Omnibus Crime Act, S. 1970, 101st Cong., 2d Sess. § 2437 (1990); Money Laundering Improvements Act of 1991, S. 1665, 102d Cong., 1st Sess. § 209; Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, S. 543, 102d Cong., 1st Sess. § 951; Federal Housing Enterprises Regulatory Reform Act of 1992, S. 2733, 102d Cong., 2d Sess. § 1051.

hardly surprising; there was not, as petitioners contend, any "long-standing [overt act] requirement" (Pet. Br. 11) for money laundering conspiracies *as such*. Any history of proving an overt act resulted only from the fact that, before the enactment of Section 1956(h), no specific money laundering conspiracy provision existed. By necessity, that offense was prosecuted under the general conspiracy statute, 18 U.S.C. 371, which by its terms expressly requires an overt act. To the extent that history is relevant, it suggests that Congress created a new money laundering conspiracy offense in order to punish that crime more severely in a statute that omits an overt act requirement; that history thus reflects a congressional purpose to deviate from restrictions in Section 371. Cf. Model Penal Code and Commentaries Part I, § 5.03, at 453 (1985) (proposing that overt act requirement be dispensed with when the objective of the agreement is harmful enough to warrant "preventive intervention").

This Court has rejected similar arguments that Congress's silence with respect to an intent to dispense with an overt act requirement should be construed as an intent to retain it. In *Shabani*, this Court rejected the defendant's argument that the Court should read an overt act requirement into Section 846 unless Congress somewhere expressly stated its intention to omit one. 513 U.S. at 13, 17.[12] It is no answer to say (Pet. Br. 19)

[12] This Court has rejected arguments from congressional silence in other contexts. See, *e.g.*, *United States* v. *Wells*, 519 U.S. 482, 497 (1997) (rejecting argument that statute omitting an express materiality requirement should be read to include one in the absence of an expression in the legislative history of congressional intent to delete the materiality requirement that had attached to some provisions that statute incorporated); *Carter* v. *United States*, 530 U.S. 255, 270-271 & n.9 (2000) (rejecting argument that statute omitting express intent-to-steal element should be read to

that *Shabani* is irrelevant here because it was decided after Congress enacted Section 1956(h). *Shabani* was only a recent application of the longstanding rule of construction announced in *Singer* and *Nash*, of which Congress is presumed to be aware. *Albernaz* v. *United States*, 450 U.S. 333, 341-342 (1981) (this Court "assume[s] that our elected representatives * * * know the law") (internal quotation marks omitted). Petitioners contend (Br. 19-20) that those cases, decided in 1945 (*Singer*) and 1913 (*Nash*), were too old to provide meaningful guidance by the time Section 1956(h) was enacted in 1992. The *Shabani* Court, however, did not hesitate to apply the interpretive rule of those cases to a statute enacted in 1970, and there is no reason for a different result here. Indeed, a firmly entrenched interpretive principle does not lose force merely because it has not been applied in a recent case. See *Albernaz*, 450 U.S. at 342 (stating that, if anything was to be assumed from congressional silence, it was that Congress in 1970 was aware of a 1932 Supreme Court decision).

3. Petitioners also contend that Section 1956(h) is solely a "penalty provision."[13] Pet. Br. 16. Although the purpose of the new statute undoubtedly was to enhance the penalty for money laundering conspiracies, Congress achieved that purpose by enacting a new statutory provision that defined a freestanding offense: conspiracy to commit an offense defined in Section 1956 or 1957.

include one in the absence of an expression in the legislative history of congressional intent to delete the element, which was in the previous version of the statute).

[13] Petitioners have not previously raised this argument. Indeed, they never claimed that count two failed to charge an offense on the ground that 18 U.S.C. 1956(h) is merely a penalty provision.

The language of Section 1956(h) clearly establishes a substantive offense. It is undisputed that 21 U.S.C. 846 establishes a substantive offense, and Section 1956(h)'s language is identical to that of Section 846 in all material respects. Both provisions subject to criminal sanction "any person" who "conspires to commit any offense" specified elsewhere. Section 1956(h) thus contains all the elements of the common law conspiracy offense, which "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash*, 229 U.S. at 378. That Section 1956(h) also identifies the penalties for the offense does not change the analysis. Section 846 and countless other provisions of the federal criminal code that define offense conduct also identify the penalties in the same sentence. See, *e.g.*, 18 U.S.C. 1014 (Supp. I 2001); 18 U.S.C. 1016-1019. In addition, the act of conspiring to do something unlawful has traditionally been considered a criminal offense. Although Congress has at times considered making the specific *object* of a conspiracy a factor that could increase the penalty for the act of conspiring in violation of 18 U.S.C. 371, it has consistently chosen to follow a different course by enacting freestanding "crime-specific conspiracy provisions." Pet. Br. 12 n.8.[14]

Petitioners' reliance on the fact that "the session law containing the new Section 1956(h) was entitled 'Penalty for Money Laundering Conspiracies'" (Br. 14) is

[14] Petitioners' argument might have greater plausibility if Congress had amended Section 371 to add an enhanced penalty for money laundering conspiracies. As petitioners recognize (Br. 12-13), however, the House bill that contained such a proposal was never enacted. See H.R. 26, 102d Cong., 1st Sess. (1991). Moreover, as petitioners further recognize (Br. 12 n.8), Congress has eschewed amending Section 371 as a means to increase the punishment for conspiracies to commit particularly serious crimes.

not helpful to them, because the plain language of Section 1956(h) and historical practice leave no doubt that Congress established a money laundering conspiracy offense, not a sentencing factor. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (noting that "heading of a section" is "tool[] available for *the resolution of a doubt* about the meaning of a statute") (emphasis added); *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (disregarding "petitioners' invocation of the statute's title" because "the title of a statute * * * cannot limit the plain meaning of the text"). The "penalty" title in the session law would not be helpful to petitioners in any event, because such a title "certainly [does] not always signal[] a provision that deals with penalties for a substantive crime." *Almendarez-Torres*, 523 U.S. at 234 (citation omitted). See *Castillo* v. *United States*, 530 U.S. 120, 125 (2000) ("The title of the entirety of § 924 is 'Penalties,'" yet parts of that Section create "not penalty enhancements, but entirely new crimes.").

Petitioners do not explain how Section 1956(h) would function as a penalty provision. To the extent they are suggesting that it was intended to serve as a penalty provision for a money laundering conspiracy charged pursuant to Section 371, they cite no support for the proposition that a penalty provision in one statute can serve as a penalty provision for another without any cross-reference in the text to that effect. To the contrary, penalty provisions in the criminal code explicitly link the punishment to a violation of a specific section or subsection. See, *e.g.*, 18 U.S.C. 924(a)(2) ("whoever knowingly violates [enumerated subsections] of section 922 shall be fined [as provided by law]"). Indeed, the subsection at issue in *Almendarez-Torres*, upon which petitioners rely, makes clear that it is referring to an

alien who violates the law as described in the immediately preceding subsection. See 8 U.S.C. 1326(a) and (b).

4. Petitioners also seek to distinguish *Shabani* (Br. 20-23) on the ground that the drug conspiracy statute is in its own section of the United States Code, whereas the money laundering conspiracy statute is in a subsection. It is doubtful that placement of a conspiracy provision in a subsection rather than its own separate section could ever affect the determination whether an overt act is required. In recent years, Congress has established new conspiracy statutes by placing them in discrete sections of the United States Code, see 18 U.S.C. 1349; by adding, as was the case in 18 U.S.C. 1956(h), new subsections to existing sections of the Code, see, *e.g.*, 18 U.S.C. 844(m), 18 U.S.C. 924(n), 18 U.S.C. 1028(f); and by adding the phrase "conspires to" to the other prohibitions in the statute, see, *e.g.*, 18 U.S.C. 115, 18 U.S.C. 931(c), 18 U.S.C. 1958(a). In addition, Congress established conspiracy provisions containing overt act requirements as subsections of 18 U.S.C. 1831 and 1832 rather than as separate sections of the Code. 18 U.S.C. 1831(a)(5); 18 U.S.C. 1832(a)(5). Whether a conspiracy provision contains an overt act requirement does not depend on the placement of the offense within a statute, but on the language used to define the offense. Here, in light of the virtually identical language in the drug conspiracy statute and the money laundering conspiracy statute, the two should receive the same construction.

5. Finally, petitioners contend (Br. 20, 24-28) that this case diverges from *Shabani* because, they assert, a venue provision for money laundering cases enacted in 2001, 18 U.S.C. 1956(i) (Supp. I 2001), demonstrates that Congress imposed an overt act requirement in

Section 1956(h). That is incorrect. There is no reason to read a venue provision as modifying the substance of the underlying criminal prohibition. Moreover, Section 1956(i) does not define proper venue solely by reference to the place of an overt act. Even if it were so limited, Section 1956(i) is permissive and is therefore not the exclusive means to establish venue for conspiracy to launder money.

Section 1956(i) was added pursuant to the USA PATRIOT Act.[15] It addressed an issue raised by this Court in *United States* v. *Cabrales*, 524 U.S. 1 (1998), which held that Missouri was not a proper venue for the prosecution of substantive money laundering offenses that allegedly occurred entirely in Florida, even though the underlying illegal activity that allegedly generated the funds occurred in Missouri. Section 1956(i)(1)(B) makes clear that a substantive money laundering prosecution may be brought in the district in which the underlying specified unlawful activity took place, provided that the defendant participated in the movement of the criminal proceeds from that district to the district where the financial or monetary transaction occurred. Section 1956(i) also codified the existing case law that venue for conspiracies may lie in any district in which an overt act was committed. 18 U.S.C. 1956(i)(2) (Supp. I 2001).

Contrary to petitioners' contention, the provision for laying venue where an overt act was committed does

[15] Section 1956(i) provides, in pertinent part, that "[a] prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place." 18 U.S.C. 1956(i)(2) (Supp. I 2001). See p. 2, *supra*, for the text of paragraph (1).

not presuppose that an overt act is required to establish a violation of Section 1956(h). First, the venue rules set forth in Section 1956(i) do not limit venue to districts in which an overt act occurred. Indeed, Section 1956(i)(2) is phrased in the disjunctive. It specifically provides that, in a case of an attempt or conspiracy, a prosecution "may be brought in the district where venue would lie for the completed offense" *or* "in any other district where" an overt act took place. 18 U.S.C. 1956(i)(2) (Supp. I 2001). The first alternative provides venue for the prosecution of a conspiracy based on where the case could have been brought *if* the object of the conspiracy had been accomplished. The application of that venue rule turns on the substance of the unlawful agreemen—specifically, where the contemplated money laundering that the conspirators agreed to commit was to have taken place. Venue is proper in such a district under the statute even if no overt act is committed there.[16]

Even if Section 1956(i)(2)'s venue rules did turn on commission of an overt act, that section does not *require* an overt act because that section is permissive. It does not purport to preclude prosecution in a district in which "the offense was committed." Fed. R. Crim. P. 18.[17] Because common law conspiracy is committed

[16] For example, had petitioners and their co-conspirators agreed to take proceeds from their fraud and launder them in Florida, but never accomplished their objective or committed an overt act, venue for the conspiracy offense would lie in Florida under the first clause of Section 1956(i)(2).

[17] Rule 18 of the Federal Rules of Criminal Procedure states in relevant part: "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." There is no provision in Section 1956(i) that renders it the exclusive means for laying venue for a money laundering conspiracy prosecution. Rather, Section 1956(i) is explicitly written in a *permissive* fashion, describing where a pro-

wherever the illegal agreement was formed, a prosecution can always be commenced in that district, even if an overt act was committed elsewhere, or if no overt act was committed at all. See *Hyde* v. *Shine*, 199 U.S. 62, 76 (1905) ("We have ourselves decided that, if the conspiracy be entered into within the jurisdiction of the trial court, the indictment will lie there."); 4 Wayne R. LaFave et al., *Criminal Procedure* § 16.2(f), at 536 (2d ed. 1999) ("The prosecution in a conspiracy charge may be brought as to all conspirators in * * * the district in which the conspiracy was formed (i.e., the district of agreement)."); see also *Cabrales*, 524 U.S. at 9 ("If the Government can prove the agreement it has alleged, Cabrales can be prosecuted in [the district in which the unlawful agreement was formed].").

Second, it was well established at the time Congress enacted Section 1956(i)(2) that venue in conspiracy cases lies where an overt act occurred *regardless* of whether such an act is an element of the conspiracy offense. Indeed, applying the common law rule, this Court has repeatedly recognized that, in conspiracy

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secution "may be brought." Cf. 18 U.S.C. 3238 ("The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, *shall be* in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought.") (emphasis added). Section 1956(i), which, as petitioners acknowledge (Br. 24), was designed to codify this Court's suggestion in *Cabrales*, 524 U.S. at 8, that venue in a money laundering case could be laid where the underlying crime occurred in certain specified circumstances, thus expands the government's options for venue; it does not preclude the government from relying on the place-of-the-offense provision in Rule 18. Cf. *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 198-204 (2000) (rejecting restrictive interpretation of venue provisions of the United States Arbitration Act, ch. 213, 43 Stat. 883).

cases brought under statutes that do not contain an overt act requirement, venue lies either where the agreement was formed *or* where an overt act was committed.[18] See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 252 (1940) (holding that Western District of Wisconsin was proper venue for Sherman Act conspiracy charge, which did *not* require proof of overt act, because, while the conspiracy was formed elsewhere, "there was ample evidence of * * * overt acts in that district"); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402-404 (1927) (reinstating conviction on Sherman Act conspiracy charge where evidence showed that overt acts were committed in district of trial); see also *Hyde*, 225 U.S. at 365-367 (discussing common law rule); 18 U.S.C. 3237(a) ("[A]ny offense * * * begun in one district and completed in another, or committed in more than one district, may be * * * prosecuted in any district in which such offense was begun, continued, or completed.").

Lower courts have likewise applied the common law rule for venue in conspiracy cases to modern conspiracy statutes that do not require proof of an overt act. See, *e.g.*, *United States* v. *Haire*, 371 F.3d 833, 838 (D.C. Cir. 2004) (applying, in prosecution under 21 U.S.C. 846 and 963, "well established rule that prosecutions for conspiracy may be brought in any district in which some overt act in furtherance of the conspiracy was committed by any of the co-conspirators") (internal quotation marks omitted), petition for cert. pending, No. 04-6419 (filed Sept. 3, 2004); *United States* v. *Antonakeas*,

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[18] The rationale for the common law venue rule "was that the overt act, although not an element of the offense, constituted a 'renewal' or 'continuation' of the agreement and thus carried its commission into the district of that act." LaFave, et al., *Criminal Procedure*, *supra*, § 16.2(f), at 537.

255 F.3d 714, 726 (9th Cir. 2001) (holding that, in conspiracy under Section 846, "[v]enue for a conspiracy charge is appropriate in any district where an overt act committed in the course of the conspiracy occurred") (internal quotation marks omitted); *United States* v. *Romero*, 150 F.3d 821, 824 (8th Cir. 1998) ("[A]lthough separate proof of an overt act is not a necessary element of a drug conspiracy under 21 U.S.C. § 846, venue is proper * * * in any jurisdiction in which an overt act * * * was committed.") (citation and internal quotation marks omitted).

In light of the common law rule on venue in conspiracy cases and the application of that rule by the courts, including this one, to modern conspiracy statutes that omit an overt act requirement, there is no warrant for inferring that Congress must have believed that an overt act was an element of Section 1956(h) when it enacted the overt act provision in the venue statute. Instead, the common law rule on venue suggests that Section 1956(i) should be read simply as regulating venue, as it purports to do, and not as indirectly amending the conspiracy statute to overcome the common law definition of conspiracy.

Accordingly, Section 1956(i) cannot be read to "ratif[y]" (Pet. Br. 20) the view of those courts of appeals, see note 8, *supra*, that have stated that an overt act is an element of Section 1956(h).[19] The venue provision did not modify the elements of the offense.

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[19] Petitioners (Br. 26-28 & n.15) also suggest that ratification of the view of those courts can be found in the fact that Congress has amended the money laundering statutes several times without explicitly rejecting those decisions. Congress's failure to repudiate those decisions, however, is of no weight when dealing with "language as plain" as found in Section 1956(h). Cf. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.") Moreover, Congress has not made any substantive changes to Section 1956(h), and any inference from congressional inaction is "treacherous" at best. *United States* v. *Wells*, 519 U.S. 482, 496 (1997). In any event, the circuits have not uniformly read an overt act requirement into Section 1956(h). Even in those that did, the courts of appeals did not analyze that issue, and the defendants' convictions were affirmed. See note 8, *supra*. Under those circumstances, "even if silence could speak, it could not speak unequivocally to the issue here." *Wells*, 519 U.S. at 496.

D. Congress's Definition Of The Elements Of The Offense And Its Penalties Is Entitled To Great Deference

Petitioners describe money laundering conspiracy as a "doubly derivative crime" (Br. 28) that imposes a 20-year maximum sentence when the underlying crime from which the illegal funds are generated and the conspiracy to commit that crime may require considerably less. The inclusion of an overt act requirement would be desirable as a policy matter, they argue, because it ensures that defendants do not face Section 1956(h)'s higher penalties unless a co-conspirator has committed some act beyond the defendants' illegal agreement, thus demonstrating that the crime is not "too inchoate." Pet. Br. 30-32. Without acknowledging the apparent contradiction, petitioners also concede that "[a]n overt act requirement has seldom materially increased the difficulty in securing conviction for conspiracy," because "virtually any act will satisfy the * * * requirement." *Id.* at 32.

Petitioners' policy argument is misdirected. The unambiguous language of Section 1956(h), and this Court's decisions holding that conspiracy statutes that do not mention an overt act requirement will not be read to include one, control the interpretive issue. In

any event, the argument lacks merit, because it ignores the fact that Congress, in defining the elements of the offense and setting the punishment, made a judgment, reflected in the statutory text, about the appropriate coverage of Section 1956(h) and its sanctions. This Court has long made clear that it defers to the legislature in making those policy judgments. See, *e.g.*, *Staples* v. *United States*, 511 U.S. 600, 604 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy.") (citation omitted).

Congress intended the punishment for money laundering offenses "to convey the seriousness with which the Committee views money laundering activity, and the importance of deterring such activity for the public good." S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986); see H.R. Rep. No. 855, 99th Cong., 2d Sess. 7-10, 16 (1986).[20] Any disparity between the sanctions for the underlying offense and the substantive money laundering crime thus reflects Congress's intent to punish the crimes disparately. And because Congress chose to

[20] Indeed, the 1986 legislation reflected Congress's determination to combat money laundering, a "pervasive[]" problem that Congress found is inextricably tied to drug trafficking and organized crime. S. Rep. No. 433, *supra*, at 2-4. And Congress more recently has sought to address the symbiotic relationship between money laundering and international terrorism. See, *e.g.*, International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, § 301, 115 Stat. 296.

punish money laundering conspiracy as harshly as the substantive money laundering offense, see 18 U.S.C. 1956(h), any differences between that penalty and the ones for conspiring to commit the specified unlawful activity are similarly deliberate. Indeed, petitioners emphasize throughout their brief that Congress's whole purpose in enacting Section 1956(h) was to increase the penalties for money laundering conspiracies beyond the penalties available for conspiracies charged under Section 371.

An overt act requirement would not mitigate that disparity, as petitioners concede (Br. 30). Nonetheless, they contend that it serves the significant purpose of demonstrating a defendant's "clear resolve and intent to commit the crime." *Ibid.* That position ignores the fact that overt acts need not be illegal, see, *e.g.*, *Yates* v. *United States*, 354 U.S. 298, 334 (1957), or even substantial, and have been described as "the slightest action on the part of the conspirators." Paul Marcus, *Prosecution and Defense of Criminal Conspiracy Cases* § 2.08(3), at 2-81 (2004) (internal quotation marks omitted); see Model Penal Code and Commentaries Part I, § 5.03, at 454 (1985) ("[I]t has been well settled that any act in pursuance of the conspiracy, however insignificant, is sufficient.").

E. The Rule Of Lenity Does Not Apply To Unambiguous Statutes

Finally, contrary to petitioners' contention (Br. 33-35), the rule of lenity has no application here. That rule "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *Shabani*, 513 U.S. at 17; accord *Staples*, 511 U.S. at 619 n.17. That was not the case in *Shabani*, and, for the same reasons, that is not the case here.

Petitioners' reliance (Br. 34) on *Taylor* v. *United States*, 495 U.S. 575 (1990), is misplaced. There, the Court rejected the view that 18 U.S.C. 924(e), a provision that enhances sentences based on prior convictions, including convictions for "burglary," incorporated the common law definition of burglary. The Court explained that "the contemporary understanding of 'burglary' has diverged a long way from its common-law roots," *Taylor*, 495 U.S. at 593, such that adopting the common law definition "would not comport with the purposes of the enhancement statute," *ibid.* By contrast, there is no indication here that punishing money laundering conspiracies without proof of an overt act would undercut Congress's purposes, or that the common law rule that no overt act is required to prove a conspiracy has been entirely supplanted by later developments.[21]

[21] The Court should not address petitioners' request (Br. 7 n.6) to dispose of the case consistent with *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105, because petitioners did not raise a Sixth Amendment claim in the court of appeals or in their petitions for certiorari, and the single question on which this Court granted certiorari does not encompass such a claim. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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